No. 87-5259

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FRANK DEAN TEAGUE,

Petitioner,

v.

MICHAEL LANE, *et al.*,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

JULIUS LEVONNE CHAMBERS
CHARLES STEPHEN RALSTON*
NAACP Legal Defense and
Educational Fund, Inc.
99 Hudson Street
New York, New York 10013
(212) 219-1900

JOHN A. POWELL
STEVEN R. SHAPIRO
American Civil Liberties Union
132 West 43rd Street
New York, New York 10036
(212) 944-9800

Attorneys for Amici Curiae

*Counsel of Record

32 pp

Question Presented

Whether a prosecutor's use of peremptory challenges to exclude Blacks from jury service because of their race violates the Sixth and Fourteenth Amendments to the Constitution of the United States?

Table of Contents

Table of Authorities

Cases:

Statutes: Page

No. 87-5259

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

==========

FRANK DEAN TEAGUE,

Petitioner,

v.

MICHAEL LANE, et al.,

Respondent.

==========

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF AMICI CURIAE OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

Interest of the Amici*

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit

*Letters from the parties consenting to the filing of this Brief have been lodged with the Clerk of the Court.

corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist Blacks to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal aid without cost to Blacks suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own behalf. For many years its attorneys have represented parties and have participated as amicus curiae in this Court and in the lower federal courts in cases involving many facets of the law.

The Fund has a long-standing concern with the issue of the exclusion of Blacks from service on juries. Thus, it has raised jury discrimination claims in

appeals from criminal convictions,[1] pioneered in the affirmative use of civil actions to end discriminatory practices,[2] and, indeed, represented the petitioner in Swain v. Alabama, 380 U.S. 202 (1965), the case which first raised the issue of the use of peremptory challenges to exclude Blacks from jury venires.

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization with over 250,000 members dedicated to the principles of liberty and equality embodied in the Constitution and civil rights laws. As part of its commitment to legal equality, the ACLU has long opposed any and all forms of racial discrimination in the administration of

---

1 E.g., Alexander v. Louisiana, 405 U.S. 625 (1972).

2 Carter v. Jury Commission, 396 U.S. 320 (1970); Turner v. Fouche, 396 U.S. 346 (1970); Mitchell v. Johnson, 250 F. Supp. 117 (M.D. Ala. 1966).

justice. Of particular relevance here, the ACLU represented petitioner in McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984), vacated and remanded, 106 S.Ct. 3289 (1986), the first federal case holding that a prosecutor's use of peremptory challenges to screen prospective jurors on racial grounds violates the Sixth Amendment.

SUMMARY OF ARGUMENT

I.

The use of peremptory challenges to affirmatively create an unrepresentative jury by striking Blacks violates the Sixth Amendment. This Court has held on a number of occasions that there is no constitutional right that the particular jury that tries a defendant minor the community from which jurors are drawn. However, when the fair opportunity to obtain a representative jury is thwarted

by the exclusion of Blacks at the final selection stage, then the result is precisely the same as if the jury pool itself were unrepresentative. Therefore, the basic right guaranteed by the Sixth Amendment is violated.

II.

The action of the prosecutor in this case violated Swain v. Alabama, 380 U.S. 202 (1965). Nothing in that decision requires the result that an admission by the prosecutor that a Black venireman was excluded because of race did not establish a violation of the Fourteenth Amendment. To the contrary, such an admission is direct evidence of intentional discrimination and is the strongest evidence on which to base a holding that the equal protection clause has been violated.

I.

THE EXCLUSION OF BLACK JURORS VIOLATES THE RIGHT TO HAVE A JURY REPRESENTATIVE OF THE COMMUNITY.

The question presented by this case may be simply stated: if the use of peremptory challenges to exclude Blacks results in juries that are unrepresentative of the community, does the practice violate the Sixth Amendment, which is applicable to the states through the Fourteenth. [3]

Taylor v. Louisiana, 419 U.S. 522 (1975), held that "[t]he unmistakable import of this Court's opinions, at least since 1940 . . . is that the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial." 419 U.S. at 528. In Smith

---

[3] Duncan v. Louisiana, 391 U.S. 145 (1968); Taylor v. Louisiana, 419 U.S. 522 (1975).

v. Texas, 311 U.S. 128, 130 (1940), the Court declared that exclusion of racial groups from jury service was "at war with our basic concepts of a democratic society and a representative government." Ballard v. United States, 329 U.S. 187 (1946), reversed a conviction by a jury from which women had been excluded, relying on a federal statutory "design to make the jury a 'cross-section of the community.'" In Brown v. Allen, 344 U.S. 443, 474 (1953), the Court asserted that the source of jury lists must "reasonably reflect . . . a cross-section of the population suitable in character and intelligence for that civic duty."

In Taylor the Court also relied on its decision in the six-person jury case, which had stated that a jury should "be large enough to promote group deliberation . . . and to provide a fair possibility

for obtaining a representative cross-section of the community." Williams v. Florida, 399 U.S. 78, 100 (1970). (Emphasis added.) On the basis of this precedent, the Court declared:

> We accept the fair-cross-section as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation. The purpose of a jury is to guard against the exercise of arbitrary power -- to make available the common sense judgment of the community as a hedge against the over-zealous or mistaken prosecutor . . . This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system . . . [T]he broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility.' Thiel v. Southern Pacific Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting).

Taylor v. Louisiana, 419 U.S. at 530-31.

The requirement of a fair cross-section in jury selection has also been adopted by statute as "the policy of the United States." [4] Taylor quoted approvingly from the House Report on the Federal Jury Selection and Service Act.

---

[4] Federal Jury Selection and Service Act of 1968, Pub. L. 90-274, 82 Stat. 53, 28 U.S.C. §§ 1861 et seq. Section 1862 provides that:

> No citizen shall be excluded from service as a grand or petit juror . . . on account of race, color, religion, sex, national origin, or economic status.

See also, Section 2 of the Uniform Jury Selection and Service Act (National Conference of Commissioners on Uniform State laws, 1970), and Md. Ann. Code § 8-1-13. The Uniform Act has been substantially adopted by eight states. Colo. Rev. St. §§ 13-71-107 to 13-71-121 (1971); Idaho Code §§ 2-201 to 2-221 (1971); Hawaii Rev. Stat. §§ 612-1 to 612-26 (1973); Indiana Code §§ 33-4-5.5-1 to 33-4-5.5-22 (1973); 14 Maine Rev. St. §§ 1211 et seq. (1971); Minn. Stat. Ann. §§ 593-31 to 593-50 (1977); Miss. Code 1972, §§ 13-5-2 et seq. (1974); No. Dakota Code §§ 17-09.1-01 to 27-09.1-22 (1971).

> It must be remembered that the jury is designed not only to understand the case, but also to reflect the community's sense of justice in deciding it. As long as there are significant departures from the cross sectional goal, biased juries are the result -- biased in the sense that they reflect a slanted view of the community they are supposed to represent.

419 U.S. at 26 n. 37.

The conclusion that the Sixth Amendment bars the use of peremptory challenges to exclude Blacks from the jury that will sit is not inconsistent with decisions of this Court, relied upon by the court below, which hold that the defendant has no right to have his particular jury represent the community with precision. [5] Thus, for example, in a

---

[5] Apodaca v. Oregon, 406 U.S. 404, 413 (1972) (plurality opinion); Fay v. New York, 332 U.S. 261, 284 (1947); Lockhart v. McCree, 476 U.S. __, 90 L.Ed.2d 137 (1986). For a careful analysis of this Court's Sixth Amendment decisions, see McCray v. Abrams, 750 F.2d 1113 (2d Cir 1984, vacated and remanded, 106 S.Ct. 3289 (1986).

community in which one third of the persons eligible for jury service are Black there is no absolute right to have a jury with four Blacks out of the 12 jurors.

Although this proposition is correct, it does not negate the conclusion that the affirmative use of peremptory challenges to produce an unrepresentative jury violates the Sixth Amendment. What this Court has held is that, assuming a system of jury selection that results in jury lists that are representative of the community, the use of a neutral device to select particular juries does not violate the Fourteenth Amendment just because in a particular case the jury may not precisely mirror that community. [6] Put another way, although there is an affirmative

---

[6] See, e.g., Taylor v. Louisiana, 419 U.S. at 538.

obligation to have a process by which a representative jury can be chosen, there is not an affirmative obligation to achieve the result of juries that are precisely representative.

But the converse must also be true: there is a right not to have selection methods that result in unrepresentative juries. The protections of the Sixth and Fourteenth Amendments cannot stop with the composition of the jury roll, but extend to the selection of the specific jury itself. See Ballew v. Georgia, 435 U.S. 223 (1978); Alexander v. Louisiana, 405 U.S. 625 (1972). Thus, a defendant has the right to a fair opportunity for a jury on which are represented the various groups that make up the community in which he is tried. To allow the unscrutinized use of peremptory challenges on the basis of race biases the process as surely as

the exclusion of Blacks from the jury lists. Lockhart v. McCree, 476 U.S. ___, 90 L.Ed.2d 137 (1986), hardly requires this result. Fairly read, the statement in Lockhart that "extension of the fair cross-section requirement to petit juries would be unworkable and unsound," id. at 148, only rejected the notion of proportional representation on the petit jury. Id. It did not reject, or even address the claim presented by petitioner here. Thus, this Court did not cite Lockhart when it remanded for "further consideration in light of" Batson and Allen v. Hardy, 478 U.S. ___, 92 L.Ed.2d 199 (1986), two cases holding that the discriminatory use of peremptory challenges violates the Sixth Amendment. See Abrams v. McCree, 92 L.Ed.2d 705 (1986); Michigan v. Booker, 92 L.Ed.2d 705 (1986).

The right to a fair cross-section is not based on the notion that individuals vote to convict or acquit because of the racial group to which they belong; rather, it derives from the principle that juries should contain representatives of the various groups in the community so that their opinions, voices, points of view, and perceptions come to bear on the deliberative process. When a prosecutor removes Blacks from the jury the result is a jury which is insulated from one of those viewpoints and voices. [7]

The question of whether the use of peremptory challenges has violated the cross-section requirement will, after all, only arise in a particular case when a

---

[7] Peters v. Kiff, 407 U.S. 493, 503-04 (1972); see Sullivan, Deterring the Discriminatory Use of Peremptory Challenges, 21 Am. Crim. L. Rev. 477 (1984), for an example of the impact on a jury's deliberations of the experiences of a black juror.

fair system has produced a panel of potential jurors that includes Blacks. Unless the prosecutor strikes them, a representative jury will sit. If then the prosecutor makes the jury unrepresentative by striking some or all of the Blacks, his abuse of the peremptory challenge violates the Sixth Amendment.

To illustrate, one may assume a county that is 20% black and that has a jury roll that is also 20% black. In trial #1, 20 potential jurors are randomly selected, one of whom is black, a result well within the range of probability. That single Black is excused for a valid, racially-neutral reason, and an all-white jury sits. That result does not violate the Sixth Amendment.

In trial #2, twenty potential jurors are randomly selected, 4 of whom, or 20%, are black. Through neutral selection

criteria 2 of the 12 jurors to sit will be black, or almost 20%. The prosecutor then affirmatively creates a non-representative jury by striking the two Blacks for racial reasons. That result does violate the Sixth Amendment. To hold otherwise would render wholly abstract and nugatory the right to jury rolls that represent a cross-section of the community, since the benefit that flows from that right -- a fair number of juries on which Blacks actually sit -- can always be thwarted.

II.

SWAIN DOES NOT REQUIRE THE COURT TO IGNORE A PROSECUTOR'S VOLUNTARY ADMISSION OF RACIAL DISCRIMINATION IN THE EXERCISE OF PEREMPTORY CHALLENGES

In addition to the Sixth Amendment argument discussed above, petitioner also challenges the prosecutor's use of peremptory challenges on equal protection grounds. The narrow issue now presented

for review is whether this Court's decision in Swain v. Alabama, 380 U.S. 202 (1965), was meant to foreclose an equal protection claim even when the prosecutor candidly acknowledges that his or her use of peremptory challenges was prompted by racially discriminatory motives.

Clearly, any such admission would be dispositive after Batson v. Kentucky, 476 U.S. 79 (1986). The Seventh Circuit, however, has classified petitioner as one of a class of defendants who cannot take advantage of Batson because their direct appeals were completed before Batson was decided. See Allen v. Hardy, 478 U.S. ___, 92 L.Ed. 2d 199 (1986). Under these circumstances, the Seventh Circuit ruled that even an open admission of racial discrimination in jury selection could not give rise to an equal protection claim. 820 F.2d at 834 n. 6. Nothing in the

ruling or reasoning of Swain compels that result. Even if the question were closer than it is, the fact that Swain has now been overruled surely argues against an unduly restrictive interpretation of its discredited holding.

Fairly read, Swain is a case about evidentiary presumptions. It is not a case endorsing discrimination in jury selection. Indeed, the majority opinion in Swain begins by restating the Court's longstanding view that "a State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause." 380 U.S. at 203-4. [8]

The concern in Swain was how that

---

[8] This principle traces back at least as far as Strauder v. West Virginia, 100 U.S. 303 (1880), which struck down a state statute barring blacks from jury service.

principle could best be enforced in the context of peremptory challenges. In particular, the Court was anxious to preserve "[t]he essential nature of the peremptory challenge [as] one exercised without a reason stated . . ." Id. at 220. Accordingly, the Court held that the mere "allegation" that peremptory challenges were being used in a particular case to exclude prospective black jurors was insufficient to establish a prima facie case of discrimination. Id. at 222. Rather, under Swain, the presumption that a prosecutor's use of peremptory challenges is constitutionally legitimate can only be overcome by proof that all blacks within a given jurisdiction are being barred from jury service "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be . . ." Id.

at 223.

The tension in Swain between enforcing the principle of non-discrimination and preserving the peremptory as a challenge for which no reason need be given does not exist when the prosecutor voluntarily offers a reason for the peremptory challenge that, on its face, is racially discriminatory. At that point, the presumption of regularity articulated by Swain necessarily disappears unless it is irrebuttable. Yet clearly, Swain did not create an irrebuttable presumption or it would not have permitted even systemic proof of racial discrimination.[9]

---

[9] Swain could also be read as holding that the statistical disparities arising in a single case are ordinarily not strong enough to support an inference of invidious intent without corroboration, and that the transactional cost of obtaining corroboration was simply too high for the Court to accept. A voluntary admission of discriminatory motive, however, solves the evidentiary problems and eliminates the transactional costs.

As Justice White, the author of Swain, noted in Batson: "Swain itself indicated that the presumption of legitimacy with respect to the striking of black venire persons could be overcome by evidence that over a period of time the prosecution had consistently excluded blacks from petit juries." 106 S.Ct. at 1725. In a critical footnote, Justice White then added: "Nor would it have been inconsistent with Swain for the trial judge to invalidate peremptory challenges of blacks if the prosecutor, in response to an objection to his strikes, stated that he struck blacks because he believed that they were not qualified to serve as jurors, especially in the trial of a black defendant." Id. at n. *.

The view of Swain articulated by

Justice White is also the prevailing one in the circuits. For example, in Wethersby v. Morris, 708 F.2d 1493, 1496 (9th Cir. 1983), the Ninth Circuit concluded that the necessity of proving a pattern and practice of racial discrimination to satisfy Swain only becomes relevant if the prosecutor's motives in a particular case are not otherwise disclosed. Once the state has confessed its racial animus, there is no need to rely on circumstantial evidence. [10] In the apt words of the Ninth Circuit: "a court need not blind itself to the obvious . . ." Ibid. [11]

---

[10] Cf. McClesky v. Kemp, 107 S.Ct. 1756, 1766 (1987) (rejecting equal protection challenge to capital sentence because defendant relied "solely" on statistics and did not offer any evidence "specific to his own case").

[11] Similarly, in United States v. Greene, 626 F.2d 75, 76 (8th Cir.), cert. denied, 449 U.S. 876 (1980), the court implied that Swain would not preclude

Indeed, amici are aware of no case in any context in which this Court has ever said that the government's voluntary confession of racial discrimination is constitutionally irrelevant. Even in cases like Plessy v. Ferguson, 163 U.S. 597 (1896), the fiction of equal treatment was integral to the state's defense and essential to the Court's ruling. Disregarding this tradition, the Seventh Circuit has advanced an interpretation of

---

relief if the record revealed that the prosecutor's use of peremptory challenges was impermissibly based on race in even a single case. But see United States v. Danzey, 476 F. Supp. 1065 (E.D.N.Y. 1979), aff'd, 620 F.2d 286 (2d Cir.), cert. denied, 449 U.S. 878 (1980). Interestingly, the judge who decided Danzey was also the first federal judge to rule that the fair cross-section requirement of the Sixth Amendment barred the state from using its peremptory challenges in a racially discriminatory fashion. See McCray v. Abrams, 576 F. Supp. 1244 (E.D.N.Y. 1983), aff'd in part and rev'd in part, 750 F.2d 1113 (2d Cir. 1984), vacated and remanded, 92 L.Ed.2d 705 (1986).

Swain that condemns discrimination if it is based on statistics but condones discrimination if it is openly acknowledged. Especially after Batson, this Court should not affirm such an illogical approach, which is difficult to reconcile with Swain and impossible to reconcile with the equal protection goals of the Fourteenth Amendment.

Conclusion

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

JULIUS LeVONNE CHAMBERS
CHARLES STEPHEN RALSTON*
NAACP Legal Defense and
Educational Fund, Inc.
99 Hudson Street
New York, N.Y. 10013
(212) 219-1900

JOHN A. POWELL
STEVEN R. SHAPIRO
American Civil
Liberties Union
132 West 43rd Street
New York, N.Y. 10036
(212) 944-9800

Attorneys for Amici Curiae

* Counsel of Record